



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

JUN 19 2015

Malia Chow
Sanctuary Superintendent
Humpback Whale National Marine Sanctuary
1845 Wasp Blvd., Bldg 176
Honolulu, HI 96818

Subject: USEPA Comments on the Hawaiian Islands Humpback Whale National Marine Sanctuary
Draft Management Plan and Draft Environmental Impact Statement (CEQ # 20150063)

Dear Ms. Chow,

The U.S. Environmental Protection Agency has reviewed the Draft Environmental Impact Statement for the above referenced project. Our review is provided pursuant to the National Environmental Policy Act, the Council on Environmental Quality's NEPA Implementing Regulations (40 CFR 1500-1508), and Section 309 of the Clean Air Act.

Under the Proposed Action and other action alternatives described, the National Oceanic and Atmospheric Administration proposes to shift the management approach within the Hawaiian Islands Humpback Whale National Marine Sanctuary (HIHWNMS or NMS) from a focus on a single species (humpback whales), to a broader, ecosystem-based approach. This shift would be supported by a collection of sanctuary-wide and site-specific regulation revisions and an expansion of sanctuary boundaries. Together, these changes are designed to increase and broaden the benefits that the NMS provides to the marine and human environment of the Hawaiian Islands.

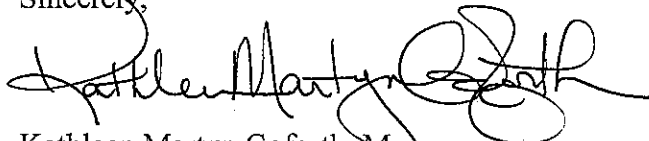
EPA supports the project goals of restoration, protection and improvement of water quality and the aquatic environment. If appropriately implemented, the proposed Sanctuary revisions have the potential to benefit the marine environment of the Hawaiian Islands by addressing a range of potential sources of habitat degradation. In particular, EPA and NOAA have a shared interest in the protection of water quality in and around the Sanctuary. To this end, we believe that close coordination and communication between our agencies is critical and would be mutually beneficial as NOAA moves forward with this proposal. In particular, EPA would like to work with the Sanctuary to provide input and assistance based on our experience and expertise related to the water quality elements, Clean Water Act requirements and details, and certain Sanctuary Focus Areas.

Upon review of the DEIS, we find that additional information is needed to clarify how certain proposed sanctuary changes would be implemented and how these changes would interface with existing local, state, and federal regulatory programs. Based upon the information provided, it appears that numerous existing regulatory programs could be affected by proposed rules, both sanctuary-wide as well as within the Special Sanctuary Management Areas (SSMAs). Additionally, some of the proposed actions, such as the regulation of land-based discharges into Maunalua Bay, while potentially beneficial, could present significant regulatory and implementation challenges that are not addressed in sufficient detail.

Based on our review, we have rated the preferred alternative (Alternative 3) as "Environmental Concerns – Insufficient Information" (EC-2) (see enclosed "Summary of Rating Definitions"). This rating is based primarily upon the need for additional information describing the regulatory context of proposed management changes, the need for further inter-agency coordination to avoid potential regulatory overlaps, and a lack of clarity as to how certain proposed actions outlined in the DEIS would be implemented as well as the anticipated benefit of these proposed actions. These concerns, as well as our recommendations for addressing them, are described in greater detail in the enclosed detailed comments.

EPA appreciates the opportunity to review this DEIS. We propose a meeting between our agencies to discuss ways in which EPA and NOAA can best coordinate as this project moves forward. To pursue this, or if you have any questions, please contact me at (415) 972-3521 or have your staff contact either Carter Jessop, the lead reviewer for this project, or Hudson Slay, EPA's Hawaii Watersheds Coordinator, at 415-972-3815 or 808-541-2717, respectively. When the Final EIS is released for public review, please send one hard copy and one CD to the address above (mail code: ENF-4-2).

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen Martyn Goforth", with a stylized flourish at the end.

Kathleen Martyn Goforth, Manager
Environmental Review Office

Enclosure: Summary of EPA Rating Definitions
Detailed Comments

cc: Shelly Lynch, USACE-Honolulu District
Keith Kawaoka, Hawaii Dept. of Health

SUMMARY OF EPA RATING DEFINITIONS*

This rating system was developed as a means to summarize the U.S. Environmental Protection Agency's (EPA) level of concern with a proposed action. The ratings are a combination of alphabetical categories for evaluation of the environmental impacts of the proposal and numerical categories for evaluation of the adequacy of the Environmental Impact Statement (EIS).

ENVIRONMENTAL IMPACT OF THE ACTION

"LO" (Lack of Objections)

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

"EC" (Environmental Concerns)

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

"EO" (Environmental Objections)

The EPA review has identified significant environmental impacts that should be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

"EU" (Environmentally Unsatisfactory)

The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potentially unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality (CEQ).

ADEQUACY OF THE IMPACT STATEMENT

"Category 1" (Adequate)

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

"Category 2" (Insufficient Information)

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analysed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

"Category 3" (Inadequate)

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analysed in the draft EIS, which should be analysed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

*From EPA Manual 1640, Policy and Procedures for the Review of Federal Actions Impacting the Environment.

**EPA's Detailed Comments on the Draft Environmental Impact Statement for the Hawaiian Islands
Humpback Whale National Marine Sanctuary Management Plan, Multiple Counties, Hawaii;
June 19, 2014**

Interagency Coordination

The Hawaiian Islands Humpback Whale National Marine Sanctuary (HIHWNMS) proposes new regulations regarding water quality, discharges, and alterations to the seafloor that relate closely to Clean Water Act (CWA) authorities implemented by the Environmental Protection Agency (EPA), State of Hawaii Department of Health (DOH) and the U.S. Army Corps of Engineers (USACE). Due to uncertainties regarding the intent, purpose, and application of some of these regulations, as well as the proposed regulatory meaning of certain terms used in the DEIS, we are concerned about the potential for overlapping authorities and regulatory conflicts. We appreciate the Sanctuary's participation in a recent conference call with EPA to discuss concerns identified during our review of the DEIS. We understand that the HIHWNMS has also held recent meetings with USACE and Hawaii DOH. We believe that further and close coordination with EPA, USACE, and DOH is essential to the smooth implementation of the proposed actions.

Recommendations: Meet with EPA, DOH, and USACE to clarify the intent, purpose, applicability, and implementation of proposed regulations with the potential to affect those agencies' activities pursuant to their CWA and other federal and state regulatory authorities (including delegation of authority agreements between EPA and DOH). Such meetings are necessary to ensure that the proposed regulations would not conflict with existing authorities or programs overseen or implemented by the aforementioned agencies.

Regulatory Context and Interface

The DEIS lacks a clear description of how the NMS would interface with existing county, state and federal regulations following the implementation of the proposed actions. For example, although the document includes the Clean Water Act in the discussion of applicable federal regulations, it does not note that the EPA is the Clean Water Act permitting authority in federal waters, nor does it describe the specifics of Clean Water Act regulatory and non-regulatory programs operated both federally and by the state (e.g., CWA Section 402 stormwater, vessel general permit, Hawaii Administrative Rules Chapters 11-54 and 11-55). Further, the document does not acknowledge nonpoint source pollution elements of the Clean Water Act, the EPA/NOAA Coastal Nonpoint Pollution Control Program established by the Coastal Zone Act Reauthorization Amendments of 1990, nor the USACE's authority to regulate dredge and fill projects in marine waters under CWA Section 404 and Section 10 of the Rivers and Harbors Act.

Recommendations: Include, in the FEIS, a more detailed discussion of the Clean Water Act and the regulatory and non-regulatory programs implemented pursuant to it by state and federal entities. Provide a complete summary of existing programs and authorities that address water quality in Sanctuary waters, as well as an analysis of gaps in regulatory and management programs (e.g. agricultural exemptions, lack of enforceable non-point source regulation, injection well discharges reaching surface waters, etc.). The FEIS should also discuss how the proposed changes to sanctuary management and regulations would affect these programs, such as in what situations the Sanctuary might review, comment and/or place conditions on county, state, or federal permits and in what situations it would issue parallel permits. Explain, also, how

NOAA's rules prohibiting alteration of the seafloor and discharges would interface with both the CWA and with USACE permits.

With respect to the proposed prohibition on discharge within the Special Sanctuary Management Areas (SSMAs), EPA notes that no definition of "discharge" or "pollutant" is provided, and it is unclear whether the definitions of these terms are intended to be the same as those provided in Section 502 of the Clean Water Act. Absent a clear definition of what constitutes a pollutant and a discharge, it is difficult for EPA to fully assess the potential implications of the proposed action.

Furthermore, the document lacks clarity regarding the nature and scope of the proposed prohibition on discharges. While the Water Quality Action Plan (page 276) implies that the NMS' authority is limited to the marine environment, information in Appendix C (page 395) indicates that regulation of discharges of land-based sources of pollution would occur within SSMAs (specifically Maunalua Bay).

Recommendations: In the FEIS, clarify whether or not the terms "discharge" and "pollutant" have the same meaning as they do under the Clean Water Act. If not, define those terms and explain how and why they differ from the CWA definitions. Clearly specify the types of discharges that would be regulated by the Sanctuary.

Clarify in the FEIS the circumstances, if any, under which the Sanctuary would comment on county, state, and local permits or issue Sanctuary permits to authorize discharges either directly into Sanctuary waters or that may enter Sanctuary waters.

EPA recommends further discussions between our agencies regarding the potential implications and challenges of regulating land-based discharges into Maunalua Bay as well as other areas of the Sanctuary to ensure the actions are complementary and address gaps in existing programs.

Water Quality Protection Action Plan

Section 10.1.3 of the DEIS describes the Sanctuary's proposed approach to protecting and improving water quality within the Sanctuary. While EPA supports the goal of water quality protection, we note that the DEIS does not clearly demonstrate the need for additional water quality protection within the Sanctuary. Furthermore, page 276 indicates that the Sanctuary's authority is limited to the marine environment; however, as previously discussed, page 395 of the DEIS (Appendix C) indicates that land-based sources that affect Sanctuary waters would also be an areas of focus and regulated in at least some areas under the proposed revised management.

Recommendations: To strengthen this Action Plan, consider using existing water quality data available in Hawaii Department of Health's (DOH) 2014 State of Hawaii Water Quality Monitoring and Assessment Report, and other sources, to describe the existing water quality problems that this proposed action plan is intended to address. Clarify, in the FEIS, whether land-based discharges will be regulated under the proposed action and, if so, how this regulation would be implemented, given the limitation of the Sanctuary's authorities to the marine environment.

With regard to Water Quality Object 2, EPA notes the focus on water quality monitoring and research, rather than direct enforcement, as the means of increasing awareness of water quality issues within the Sanctuary and, thereby, eventually improving water quality within the Sanctuary.

Recommendations: We recommend that water quality research and monitoring be coordinated with DOH and EPA to ensure that methods and data are comparable to State-promulgated water quality standards and this work informs Clean Water Act programs. Doing so will help ensure that the overall pool of relevant and available data is maximized in the long term.

Sanctuary Focus Areas

The DEIS describes four Sanctuary Focus Areas wherein particular actions would be taken “to assess and implement the appropriate place-based management approaches to improve the overall health of the marine environment” (p 323). The proposed Focus Areas are at Ni’ihau, Pila’a, Southern Maui Nui, and Maunalua Bay. For each of the focus areas, the Sanctuary proposes significant work related to water quality improvement. EPA believes that coordination between our agencies would be beneficial with regard to the proposed water quality management activities at all four sites.

Due to EPA’s involvement with a Clean Water Act Consent Decree (2006), we have knowledge related to Pila’a reef and Pila’a Stream that may be of interest and assistance to the Sanctuary in the development of its management approach for this site, specifically with regard to reef damage from sedimentation, and the stream’s restoration potential. The DEIS states that Pila’a reef was damaged by runoff and, as a result, is in need of restoration work. In fact, Pila’a was damaged by sediment flows from a one-time mass wasting of coastal slopes in 2001. To our knowledge, no assessments have been made as to the extent of reef recovery since 2003. The study and monitoring of Pila’a Stream performed in accordance with the Clean Water Act Consent Decree (2006) determined that Pila’a stream was not suitable for native aquatic life because the mauka reservoir is stocked with bass and managed for fishing. Bass occur throughout the reaches of the stream and prey on native fish and shrimp. Also, a pond within Pila’a stream contains Chinese catfish and non-native shrimp which prey on o’opu and other natives. An attempt to eradicate the catfish at a nearby stream was unsuccessful and may similarly encumber work at Pila’a.

Recommendations: We recommend coordination with EPA regarding the proposed Pila’a Sanctuary Focus Area. Clarify, in the FEIS, that the reef at Pila’a was damaged by sediment flows from a one-time mass wasting of coastal slopes in 2001. Include a more detailed discussion of proposed actions in and around Pila’a Stream and the potential role of invasive species in limiting the effectiveness of proposed actions.

For the Southern Maui Nui Sanctuary Focus Area (p. 337), EPA notes the intention to monitor wastewater discharges from vessels in South Maui waters. In EPA’s experience, this is very challenging to accomplish, but might best be attempted by placing dyes in vessel holding tanks. We also note the extensive water quality monitoring proposed for this Focus Area. As we suggested during our June 5, 2015 conference call with the Sanctuary, the establishment of a “no discharge zone” might better accomplish the stated goals for the Southern Maui Nui Focus Area. EPA would like to discuss this option further with the Sanctuary.

Recommendations: Consider existing data in designing the proposed monitoring and research programs and coordinate with EPA and the State DOH to ensure that the data collected could be used to inform future regulatory processes. In addition, consider the potential benefits and impacts of establishment of a “no discharge zone” for Southern Maui Nui in order to better accomplish stated water quality goals.

Regarding the Maunalua Bay Sanctuary Focus Area (p. 343), EPA notes that Objective SM 1.4 proposes assessment of the amount of sediment entering the Maunalua Bay at key entry points (stream mouths). Based upon EPA's experience, accurate collection of such data would require sediment gaging stations and both intensive and expensive monitoring work. Identification and reduction of erosion within the watershed might provide a more cost effective means of reducing sediment discharge into the bay.

Recommendations: Consider alternative approaches to assessing (and eventually reducing) sediment inputs into Maunalua Bay.

Miscellanea

Section 11.4, Appendix D displays a table entitled "Other Regulatory Authorities". This table could be very useful in clarifying and highlighting the gaps in existing regulations and how the proposed Sanctuary regulations would interface and complement those county, state and federal regulations. The table is incomplete and contains a number of typographical errors. For example, the row titled "Prohibit discharge and enter and injure" fails to mention Clean Water Act Section 404 and the Marine Protection, Research, and Sanctuaries Act as relating to prohibitions on discharge.

Recommendation: Revise the "Other Regulatory Authorities" table in Appendix D for completeness and accuracy.